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ALEXANDER L. STEVAS,
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No. 82-135

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1982

SEARS, ROEBUCK AND COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF THE CASE	2
THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION AS THE DECISION BELOW RESTS PRIMARILY ON AN ADEQUATE NON-FEDERAL BASIS	2
ANY ARGUABLE FEDERAL QUESTION IS SO INSUBSTANTIAL THAT THE CASE DOES NOT MERIT CONSIDERATION OR FURTHER ARGUMENT	9
A. THE COMMERCIAL SPEECH DOCTRINE DOES NOT APPLY TO THIS CASE	9
B. THE STATUTE IN QUESTION IS NOT OVERBROAD	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 11

Buckley v. Valeo, 424 U.S. 1 (1976) 6

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 8, 10

City of Corona v. Corona Daily Independent, 115 Cal.App.2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953) 7, 8

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 6

Follett v. McCormick, 321 U.S. 573 (1944) 6, 7, 9

Giragi v. Moore, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937) 7, 8

Gooding v. Wilson, 405 U.S. 518, 521 (1972) 11

Grosjean v. American Press Co., 297 U.S. 233 (1936) . 7, 8

Henneford v. Silas Mason Co., Inc., 300 U.S. 577 (1937) 4

Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) 7

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 9

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, ___ U.S. ___, 102 S. Ct. 2955 (1982) 5, 6

Morrison-Knudsen Co. v. State, 64 Wn.2d 86, 390 P.2d 712 (1964), *appeal dismissed, cert. denied*, 379 U.S. 649 (1965) 3, 4

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 6, 7, 8, 9

Sears, Roebuck & Co. v. State, 97 Wn.2d 260, 643 P.2d 884 (1982) 2, 4

Steinbeck v. Gerosa, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) ... 7, 8

Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., ___ U.S. ___, 102 S.Ct. 1186 (1982) 12

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 9

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment I 2, 5, 7, 10
U.S. Constitution, Amendment XIV 2

STATUTES

RCW 82.12.010(2) 3
RCW 82.12.010(5) 4
RCW 82.12.020 3
RCW 82.12.0252 ..... 3, 4
RCW 82.12.035 3
RCW 82.12.040 5
Chapter 389, §24, 1958 Wash. Laws 4

ADMINISTRATIVE REGULATIONS

WAC 458-28-100 11

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves to dismiss this appeal on the grounds that it does not present a substantial federal question and that the decision below rests on an adequate non-federal basis.

Alternately, appellee moves to affirm the decision of the Supreme Court of Washington on the ground that the questions raised by the appellant are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

As will be elaborated below, Sears misstates the nature and incidence of the tax at issue in this case. It is not a "commercial speech tax" as stated by Sears. Juris. St. at 6. Rather, the tax is on "use" of tangible personal property, which includes acts other than the "distribution" of Sears catalogs, as described by the appellant. See pp. 3 through 5, *infra*.

The Washington Supreme Court affirmed the decision of the Superior Court on the issue of whether the tax imposed on Sears' use of its catalogs violated the first amendment to the United States Constitution as made applicable to the states through the fourteenth amendment. In its decision, the Washington Supreme Court, as a matter of state law, construed the tax as applicable to Sears' use of its catalogs in that Sears is a "'person' who holds or uses * * * tangible personal property.'" *Sears, Roebuck & Co. v. State*, 97 Wn.2d 260, 263, 643 P.2d 884, 886 (1982), Juris. St. at A-4. Because the Washington court determined that the tax in question was not one levied upon an act of speech, including any act of distribution of catalogs, the Washington court upheld the tax without reaching the commercial speech or overbreadth issues raised by Sears. This appeal followed.

We argue, first, that there is no substantial federal question as the decision below rests primarily on an adequate non-federal ground, and second, even if there is a federal question, that question can be resolved simply under existing precedent without the need for further consideration or argument.

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION AS THE DECISION BELOW RESTS PRIMARILY ON AN ADEQUATE NON-FEDERAL BASIS

Sears argues that the Washington Supreme Court erred by asserting that the use tax at issue only

tangentially impacts speech without assessing the impact of the tax on commercial speech. Juris. St. at 6. Sears, however, misstates existing constitutional doctrine and mischaracterizes Washington's use tax.

By characterizing the tax which is involved in this case as a "tax applied directly to the transfer of information," Juris. St. at 6, the appellant assumes what the Washington Supreme Court rejected. The use tax at issue is not a tax on speech; it is not a tax on the transfer of information; nor is it a tax on distribution of Sears catalogs. It is a tax on "use" of tangible personal property. RCW 82.12.020.[1]

The use tax is a complement to the retail sales tax, chapter 82.08 RCW, in that there is no use tax levied if the user has paid a sales tax, in the amount of the use tax, either to Washington or to another state. RCW 82.12.0252; 82.12.035. The term "use" is defined broadly to include

> [t]he first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and [includes] installation, *storage, withdrawal from storage*, or any other act preparatory to subsequent actual use or consumption within the state.

RCW 82.12.010(2) (emphasis added).

In other words, once the catalogs arrive in Sears' warehouse for storage, before distribution to any of Sears customers, they are, without more, already subject to the use tax. This plain meaning construction of the statute was confirmed by the Washington Supreme Court in *Morrison-Knudsen Co. v. State*, 64 Wn.2d 86, 390 P.2d 712 (1964), *appeal dismissed, cert. denied*, 379 U.S. 649

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[1]RCW 82.12.020 states in part:

There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7).

(1965),[2] and its constitutionality upheld by this Court in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937).

However, the appellant cites a 1955 amendment to Washington's use tax laws which expressly included within the definition of "consumer," for the purposes of use tax, "any person who distributes * * * any article of tangible personal property, except newspapers, * * * the primary purpose of which is to promote the sale of products or services." Chapter 389, § 24, 1955 Wash. Laws, *now codified as* RCW 82.12.010(5). By its terms, that statute only includes within the definition of consumer a type of person who is subject to the tax (*i.e.*, a distributor), but it does not define the incidence of the tax. It does not state that the tax is on "distribution."

Before the Washington Supreme Court, the Department of Revenue argued that the use tax in effect prior to that 1955 amendment covered the same kind of transaction which is involved in this case. The Washington Court agreed, saying:

> We concur with the Department that the pre-1955 statute without the 1955 amendment language was sufficient to cover the transactions in this case.

97 Wn.2d at 263, 643 P.2d at 886, Juris. St. at A-4. This Court is bound by that construction.[3]

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[2]In *Morrison-Knudsen*, the Washington Court stated:

> By the definition, to store an article (as a consumer) or to withdraw it from storage is a "use" of it. According to the evidence, the respondents performed these and other acts of dominion and control over the articles, * * * *

64 Wn.2d at 92, 390 P.2d at 716.

[3]The Washington Court looked at the plain language of the definition of consumer in effect before the 1955 amendment as well as administrative history in the record, which illustrates the pre-1955 administrative construction of the applicability of the use tax to use of catalogs by large retailers, such as Sears.

The 1955 Amendment clarified who should bear the burden of the use tax, the retailer or the customer. It makes no sense to place the burden on the customer, but that is just where it would be placed if Sears prevails here. Currently, the customer's use is exempt from tax as his or her donor, Sears, pays it. RCW 82.12.0252.

So construed, the threshold question for this Court, is whether the general use tax as applied to Sears' storage and withdrawal of storage of its catalogs infringes upon Sears' first amendment rights.

This case is substantially different from the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 314 N.W.2d 201 (Minn. 1981), *prob. juris. noted*, No. 81-1839, ___ U.S. ___, 102 S.Ct. 2955 (1982). There, one issue was whether a use tax directed at newspapers, but placing no greater overall burden on newspapers than other publishers, was constitutional. In contrast, here there is no new tax specifically directed at any activity arguably within the first amendment. It is simply a general tax applied (both before and after 1955) to a commercial enterprise which arguably, in the course of that enterprise, engages in certain protected first amendment activity.[4]

However, if there were a shift of the tax down the chain of distribution, Sears nevertheless would be responsible for collecting the use tax on the customer, in the same manner that a retailer collects the sales tax on goods sold to the customer.

RCW 82.12.040 states:

> Every person who maintains in this state a place of business * * * shall, at the time of making sales, or making transfers of either possession or title or both, of tangible personal property for use in this state, collect from the purchasers or transferees the tax imposed by this chapter. * * *

In other words, shifting the burden of the tax from Sears to its customers does not change Sears' burden to pay the tax to the State. The only practical difference would be that, if the tax is imposed on Sears' use, the cost of the tax would be spread to all Sears' customers, catalog users as well as others. If the tax is imposed on the catalog users, as argued by appellant, the cost is only spread to them. In sum, the burden imposed on any Sears' first amendment rights by the use tax is no greater than the burden imposed without the tax on Sears.

[4]In footnote 7 of its Jurisdictional Statement, Sears argues that the *Minneapolis Star* case is different from this case in that the Minneapolis Star newspaper was "revenue producing," while the Sears catalogs are distributed free of charge. Such a distinction is puzzling in that the purpose of distribution of Sears catalogs definitely is commercial gain. The fact that they are distributed free makes no difference. Indeed, the cost of the catalogs (and the tax on their use) is passed on to the Sears customers in the form of higher prices of goods sold.

Also present in *Minneapolis Star* was the issue of discrimination in the application of the tax against large newspapers which, according to the appellant in that case, discouraged circulation in violation of the principles set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). See Juris. St. at 14-15, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, No. 81-1839.[5] The use tax at issue here is applied equally to all users of catalogs, whether large retailers such as Sears or small retailers. All pay at the same rate.

Sears cites as its primary authority *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944), for the proposition that even a general tax may be unconstitutional if the impact on speech is direct. Juris. St. at 6. Both *Murdock* and *Follett* involved local ordinances requiring licenses, including fees, for the privilege of "canvassing" or "soliciting" (*Murdock*), or "selling books" (*Follett*). Justice Douglas, who wrote the opinion in each case, characterized the license fees as being levied directly on, and as a prerequisite to, acts of speech, *i.e.*, canvassing, soliciting, or selling. *Murdock*, 319 U.S. at 112; *Follett*, 321 U.S. at 578. Justice Douglas distinguished such fees from other general taxes not directed at prerequisites to acts of speech, such as the use tax here at issue, stating:

> We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on *property used* or employed in connection with those activities.

Murdock, 319 U.S. at 112 (emphasis added).[6]

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[5] In *Buckley*, this Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment * * * *

424 U.S. at 48-49.

[6] The court pointed out in both *Murdock* and *Follett* that a person going door to door distributing religious literature, whether for a price or not, is in a different category than a person going door to door as a

The Court in both *Murdock* and *Follet* cited *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), where the Court, speaking of taxes *directed* at newspapers, said:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

Id. at 250.

Indeed, this Court consistently has rejected appeals from state courts which have upheld nondiscriminatory business taxes on newspapers or other publishing enterprises. *E.g., Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) (gross receipts tax on receipts of an author from grant of licenses to his rights in his literary works); *City of Corona v. Corona Daily Independent*, 115 Cal.App. 2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953) (general business license tax applied to newspapers); *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937) (excise tax on gross proceeds from sale of newspapers).[7]

In sum, this Court consistently has upheld business taxes and regulations[8] which apply generally to all businesses including those exercising first amendment freedoms. It has overturned taxes or license fees as infringements upon first amendment rights only where the tax is *directed at* a business, such as newspapers, engaging primarily in first amendment activity, as in *Grosjean*, or

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merchant selling his wares. The implication is that the ordinances at issue in *Murdock* and *Follett*, while unconstitutional as applied to a Jehovah's Witness, would be applicable to a Sears salesman selling, or distributing free of charge, Sears catalogs.

[7]This Court dismissed *Giragi* for want of a substantial federal question, citing *Grosjean*, 297 U.S. at 250.

[8]*See Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946).

where the tax is levied on or as a prerequisite to an act of speech, as in *Murdock*. The taxes in *Steinbeck*, *Giragi*, and here did not tax any act of speech, nor were they directed at businesses substantially engaging in first amendment activity.[9]

Even assuming that the *Murdock* license fee is analogous to the Washington use tax, Sears misstates constitutional doctrine when it implies that the courts must analyze whether the impact from the tax is direct or "tangential." There is no such quantum test to be applied.

Grosjean, *Murdock*, and the various state court cases which have considered this question require no inquiry into "effect" if the tax is general. Certainly, every business tax or business regulation imposed on publishers raises the cost of business, thereby increasing the economics of exercise of speech. That burden is what is meant by "tangential" impact. In other words, if the tax is general, the inquiry ends.[10] If any inquiry is relevant, it is limited to whether the tax creates a prior restraint on the speech, as this Court specifically determined in *Murdock*, 319 U.S. at 114. Here, there is no such prior restraint on Sears' activity. There is no governmental permission or license of any kind which is a prerequisite to the exercise of any Sears commercial communications.[11]

Given the state court characterization of the tax here at issue, there is no tax on speech or any act of speech in this case any more than there would be in the case of a

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[9]Note that in *Corona Daily Independent*, Justices Douglas and Black dissented from the denial of a writ of certiorari, 346 U.S. 833, on the ground that the license fee applied to newspapers was a license on a first amendment activity, citing *Murdock*.

[10]This is particularly true in the commercial speech context where the first amendment offers less protection than in other areas of speech. See pp. 9-10, *infra*.

[11]Sears perhaps would argue that the tax nonetheless "chills" the exercise of Sears' commercial speech rights. However, this Court has consistently noted that because of the character and nature of commercial speech, it is not susceptible of such chilling. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 n. 6 (1980).

retail sales tax on sales of books (or catalogs), or a property tax on bookstores, or a gross receipts tax on publishers of books or newspapers. Accordingly, this appeal should be dismissed for want of a substantial federal question.

ANY ARGUABLE FEDERAL QUESTION IS SO INSUBSTANTIAL THAT THE CASE DOES NOT MERIT CONSIDERATION OR FURTHER ARGUMENT

A. THE COMMERCIAL SPEECH DOCTRINE DOES NOT APPLY TO THIS CASE.

Even if the tax were construed to be of a character similar to the license fees described in *Murdock* and *Follett*, the facts of this case distinguish it. The commercial speech cases previously decided by this Court have arisen primarily in the context of state prohibitions of various forms of communications, primarily advertising for professional services. This Court has recognized that while the offer for sale of certain goods or services is not afforded the same protection as political or other "core" speech,[12] such commercial speech is afforded some constitutional protection from prohibition by the state. Indeed, the cases which have been decided so far all involve complete state bans of such speech. Such bans have been upheld where there is a sufficient state interest, such as an interest to prevent misleading or untruthful advertising but have been overturned where there is no such state interest. Indeed, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court upheld a ban of certain commercial advertising by billboards, justifying the decision on an aesthetic interest of the City of San Diego. In other words, the state interests need not be compelling in order to justify a regulation, or even a prohibition, of commercial speech.

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[12]*E.g. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976).

The four-part test originally adopted by this court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), if adopted and applied here, should result in an affirmance of the decision below primarily because the state tax system places no greater burden on Sears greater than that placed on other retailers not claiming first amendment protection.

The *Central Hudson* test is as follows:

1. Is the expression protected by the first amendment, i.e., does it cover lawful activity and is it not misleading?
2. Is the government interest substantial?
3. Does the state law advance the government interest asserted?
4. Is the state law more extensive than necessary to serve that interest? 447 U.S. at 566.

Assuming Sears' activity is protected, the Washington use tax passes this test. Revenue raising certainly is an important interest of government. The state use tax advances that interest. Finally, the use tax as applied to Sears is not more extensive than necessary; it is applied at the same rate as all other use taxes.[13]

Lastly, the commercial speech cases have arisen in areas where there is a demonstrated impact that supression of the speech will lead to adverse impacts on the consumers, in the form of higher prices, fewer choices

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[13]We recognize the *Central Hudson* test was formulated in the context of government regulation, not taxation. Accordingly, given an appropriate case, this Court may not strictly apply this test in the taxation context. However, the basic elements of the test are two: a balancing of the State interests in the governmental action with protected first amendment interests of the business and an assurance that the State law does not single out the affected business for treatment harsher than that given other similarly situated businesses. In this case, the protected interest of Sears, if any, is an ability to communicate price and other information to its customers. The State's interest is revenue from a broad tax base. Given the minimal or non-existent impact of the tax in question on Sears' ability to communicate, *see* n. 3, *supra*, and the lack of discrimination in the application of the tax, the commercial speech doctrine should not void this tax.

in the marketplace, or other similar impacts.[14] Here, there is no such demonstration.

B. THE STATUTE IN QUESTION IS NOT OVERBROAD.

The construction of the tax by the Washington Supreme Court renders any discussion or decision relating to overbreadth unnecessary.

However, should this Court reach the question, it should affirm the decision below in that the overbreadth doctrine simply is not applicable. As indicated in *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973), this Court has recognized only in the rarest of circumstances exceptions to the general rule that a person may not challenge a statute on the ground that it may conceivably be applied unconstitutionally to others. The *Broadrick* decision marked a limitation on, if not a retreat from, the broad overbreadth doctrine articulated in some of the Court's prior cases which have been cited by the appellant.

The overbreadth doctrine allows a person to assert the first amendment rights of others who arguably would never get their day in court because of fear of criminal sanctions "chilling" their first amendment activity. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

Sears here argues that political speech of others may be "chilled" because of a threat of taxation if too many advertisers are included. However, here there are no criminal sanctions. If owners of a business wish to make political statements through a publication and include in that publication advertisements for the sale of goods, but fear that such political speech may result in a tax burden, they have an easy pre-publication remedy. They may seek a declaratory ruling from the Department of Revenue on the taxability of the publication. WAC 458-28-100. Here, the tax in question can relate only to printed

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[14] *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 754, 763 n. 18, 765 n. 20 (1976) (data on drug price variation).

advertisements, which take some time to prepare and on which consideration can be given by both the taxpayer and the Department of Revenue as to whether or not the messages contained therein constitute protected first amendment speech. The overbreadth doctrine simply is not applicable. Accordingly, this Court need not refine its earlier statements that the "overbreadth doctrine does not apply to commercial speech," *e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ___ U.S. ___, 102 S.Ct. 1186, 1192 (1982), as suggested by appellant. Juris. St. at 10-11, n. 22.

CONCLUSION

Sears apparently attempts to ride into the Supreme Court on the coattails of *Minneapolis Star & Tribune*. That case presents a substantial federal question for resolution. This case does not, as the Washington Supreme Court construed the tax as one not directed at any act of speech. So construed, whatever federal questions arguably remain may be resolved in favor of the State within existing bounds of constitutional law and policy.

Respectfully submitted,

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